

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JIMMIE HARDAWAY, JR.,
LARRY A. BOYD,
FIREARMS POLICY COALITION,
INC.,
SECOND AMENDMENT FOUNDATION,*

Plaintiffs,*

v.*

Docket Number:
1-22-cv-00771-JLS

Buffalo, New York
November 3, 2022

2:01 p.m.

STEVEN A. NIGRELLI,
In his official capacity as
Superintendent of the New
York State Police,
BRIAN D. SEAMAN,
In his official capacity as
District Attorney for the
County of Niagara, New York,
JOHN J. FLYNN,
In his official capacity as
District Attorney for the
County of Erie, New York.*

Defendants.*

* * * * *

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN L. SINATRA, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:

PHILLIPS LYTLE LLP,
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8 For the Defendant Seaman: GIBSON McASKILL & CROSBY, LLP.,
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13 For the Defendant Flynn: COUNTY OF ERIE,
14 DEPARTMENT OF LAW,
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19 PRESENT: NIAGARA COUNTY ATTORNEY,
20 CLAUDE A. JOERG, ESQ.,
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24 The Courtroom Deputy: KIRSTIE L. HENRY

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Proceedings recorded by mechanical stenography,
transcript produced by computer.

(Proceedings commenced at 2:01 p.m.)

THE CLERK: All rise.

1 The United States District Court for the Western
2 District of New York is now in session. The Honorable John
3 Sinatra presiding.

4 **THE COURT:** Please be seated.

5 **THE CLERK:** The Court advises parties and listeners
6 that they are strictly prohibited from recording these
7 proceedings in whole or in part by any device.

8 In Hardaway and others versus Nigrelli and others,
9 case number 22-CV-771. This is the date set for a hearing on a
10 motion for preliminary injunction.

11 Counsel for the plaintiffs, please state your
12 appearances for the record.

13 **MR. ROTSKO:** Nicholas Rotsko and Samuel M. Williams of
14 Phillips Lytle for the plaintiffs.

15 **THE CLERK:** And counsel for the defendants.

16 **MR. BELKA:** Assistant Attorney General Ryan Belka,
17 Office of the Attorney General for defendant Nigrelli.

18 **MR. KIRBY:** Kenneth R. Kirby, Assistant Erie County
19 Attorney appearing for John J. Flynn, in his official capacity
20 as district attorney for the County of Erie New York.

21 **MR. CROSBY:** Brian Crosby and Claude Joerg on behalf
22 of Brian Seaman in his official capacity as District Attorney of
23 Niagara County.

24 **THE COURT:** Okay. Good afternoon, Counsel. We're
25 here for argument -- a hearing, if you like, on plaintiff's

1 motion for a preliminary injunction.

2 I'll start by indicating for the record that this
3 proceeding incorporates the argument on the TRO motion that took
4 place two weeks ago, October 20th.

5 So for the purpose of my decision on the preliminary
6 injunction, we don't need to repeat today what was argued at --
7 the last time you were here, the TRO argument.

8 Is that acceptable to everyone?

9 **MR. ROTSKO:** Yes, Your Honor.

10 **MR. BELKA:** Yes, Your Honor.

11 **MR. KIRBY:** Yes, Your Honor.

12 **MR. CROSBY:** Yes.

13 **THE COURT:** Okay. So like we did the last time, I've
14 got some questions for you.

15 Again, like the last time, if you've got something
16 that my questions don't cover and you need to say, go ahead and
17 indicate that and I'll give you the opportunity to say that as
18 well.

19 First thing I want to cover, as a preliminary matter,
20 regarding the scope or the facial versus the as-applied issue
21 that is pressed by the State or by defendant Nigrelli, who
22 argues that plaintiffs can only succeed if they show no set of
23 circumstances exists where the statute would be valid.

24 In other words, that the law is unconstitutional in
25 all applications, or at least that it lacks a plainly legitimate

1 sweep.

2 Am I bound to search my imagination for a plainly
3 legitimate sweep? Does anyone have one? Does anyone want to
4 articulate what a plainly legitimate sweep is?

5 Mr. Belka, it's your argument.

6 **MR. BELKA:** Thank you, Your Honor. In fact, I noted
7 in the reply that there is a claim that we haven't actually
8 identified a situation in which the Second Amendment right to
9 carry would be prohibited in places of worship and in a
10 situation where that might be legitimate.

11 Your Honor, I think that the frame that the Court has
12 taken in the TRO is to take the very specific allegations of the
13 plaintiffs and to review them against the analytical frame of
14 Bruen.

15 Our argument is that what is required is that a more
16 difficult situation, as opposed to one where the parishioners
17 want to concealed carrying. But, in fact, a situation where the
18 parishioners do not want somebody to have a concealed carry.

19 In fact, that parishioners feel that somebody
20 concealing carry amongst their midst might infringe upon their
21 fundamental rights to express their -- themselves and their
22 religion in their places of worship.

23 That that is a more suitable analytical view for a
24 facial challenge -- a preenforcement facial challenge, as has
25 been advanced by the plaintiffs here.

1 **THE COURT:** Mr. Rotsko?

2 **MR. ROTSKO:** The situation where a church may or a
3 parishioner may not want to be in a church with somebody with a
4 concealed carry weapon, that doesn't give rise to a plainly
5 legitimate sweep, because the -- there is nothing under the
6 Second Amendment that would prevent the church from regulating
7 concealed carry within its own property.

8 So this -- this -- the place of worship ban here does
9 not have a plainly legitimate sweep.

10 There is nothing obvious -- there is no obvious set of
11 facts that are plain and simple on the surface, where it does
12 not infringe upon the right -- the Second Amendment rights of
13 parishioners or clergy.

14 **THE COURT:** If I were to work really hard at this,
15 Mr. Belka, like maybe I've been doing -- you can assume I've
16 been doing some thinking about what a plainly legitimate sweep
17 might be.

18 And if I were to do that and rack my brain and come up
19 with something, then I have got to refine it and refine it and
20 refine it and test it and think about it and test it and think
21 about it and am I not legislating at that point?

22 **MR. BELKA:** Your Honor, I don't think that you are
23 legislating. I think that you are looking for -- I think that
24 it is supposed to be hard to overturn, in this case, a -- the
25 legislation that has been passed by democratically elected

1 leaders.

2 So I would suggest to the Court that it is supposed to
3 be difficult to, in some ways, search our brains and our
4 imagination for those kinds of situations that are more
5 difficult than the ones than these individual plaintiffs
6 present, in part, because this law is not being enforced against
7 these plaintiffs.

8 It is not being applied to them. It is a
9 preenforcement challenge to a piece of legislation and it's
10 supposed to be difficult.

11 Obviously, we cite to the Georgia carry law from the
12 11th Circuit that does articulate a little bit of what type of
13 analysis the Court should be going through and determining
14 whether an individual who wants to carry into a place of
15 worship, where they don't want it, would an arrest under those
16 circumstances violate the Second Amendment.

17 I believe that's the kind of analytical frame we need
18 to look at in a facial challenge.

19 **THE COURT:** All right. Anyone else on this topic?

20 **MR. ROTSKO:** I would just point out, Your Honor, that
21 if it's a hard and difficult endeavor to find an instance where
22 the law might not be unconstitutional, then it isn't a plainly
23 legitimate sweep. I think plainly is there for a reason.

24 **THE COURT:** All right. Next, let's move to likelihood
25 of success on the merits and a couple of questions there.

1 Driven -- I've -- driven somewhat by the prior round
2 of arguments, but also kind of reenforced by what I heard from
3 the amicus and the State's expert as well -- I believe he's got
4 something in there, too. If it wasn't the expert, then it was
5 you, Mr. Belka, this issue of 1791 versus, you know,
6 reconstruction era laws.

7 Can it be that the Second Amendment meant something in
8 1791 and then the meaning of the Second Amendment evolved over
9 the 75 or 80 years following?

10 **MR. BELKA:** I don't think that it's an evolution in
11 the interpretation. It's just the test requires available
12 history.

13 And as our expert noticed, history is hard. And in
14 order to resurrect what history is available, it depends on
15 chance, what's been digitized and easily searchable.

16 And I think that it is difficult to reflect when you
17 are looking at 19th century law that we presented to the Court
18 and the High Court commentary that's available, where clearly
19 certain states and territories had prohibited concealed carry in
20 places of worship.

21 And when those courts were asked to comment on it,
22 they certainly didn't identify that this was obviously a
23 violation of the Second Amendment.

24 In contrast, those courts looked at it and thought
25 that it was plainly legitimate for a state to regulate carry in

1 places of worship, as if it had been done significantly more in
2 advance of the 19th century law that we have cited.

3 I don't think it was created. It's just the available
4 history that we've been able to find in the relatively short
5 time frame that we've been able to search the historical record.

6 Do I anticipate that as this goes on and we have more
7 availability to search the historical record, we may find more
8 statutes going back further and further in time.

9 **THE COURT:** Can it be the case that the Second
10 Amendment means something vis-a-vis Congressional enactments
11 informed by what was going on around 1791 and then means
12 something different as to the states informed by what was going
13 on around the time of the enactment of the 14th Amendment and
14 reconstruction?

15 Can't it have two different meanings applicable to two
16 different sets of governments or are we bound by one meaning of
17 the Second Amendment?

18 **MR. BELKA:** I believe that what McDonald says is that
19 we were bound by one meaning of the Second Amendment, as applied
20 to the Federal Government and the states. And I think that that
21 would probably be true, as it relates to what McDonald says.

22 **THE COURT:** And then I think the corollary question,
23 Mr. Rotsko, I can't -- I'm not supposed to ignore all of the
24 enactments that came after 1791, am I?

25 Don't the Supreme Court cases actually look at

1 enactments post 1791?

2 **MR. ROTSKO:** Correct, Your Honor. If you are looking
3 for analogies to a new sensitive place, then most certainly the
4 enactments that come after the founding era have some -- should
5 be examined, particularly when they -- to see whether they
6 confirm the understanding of the meaning of the Second Amendment
7 during the founding era.

8 They can't -- you know, if statutes that depart from
9 the text are enacted later, they can't -- they can't be
10 considered to trump the meaning of the text.

11 But looking at historical tradition -- I mean, you are
12 absolutely right that Justice Thomas in Bruen spent quite a bit
13 of time analyzing historical tradition and, you know, many of
14 the same statutes that the State's expert has identified here.

15 **THE COURT:** What about this argument -- it's not so
16 much in the -- it's not so much in Mr. Belka's brief, but more
17 in his expert's declaration and in the amicus brief, I think,
18 the suggestion that -- I think it's a suggestion that the
19 Supreme Court had a pretty thin historical record when it
20 recognized those three sensitive places.

21 And if it's okay for the Supreme Court, then it's okay
22 for me to recognize a thin historical record. I think that's a
23 fair representation of the argument.

24 How do you respond to that, Mr. Rotsko?

25 **MR. ROTSKO:** First, that I don't think that the -- the

1 Supreme Court did have a thin historical record for recognizing
2 those three types of sensitive places.

3 They had the -- the Supreme Court there cites an
4 amicus brief from the independent institute which provides the
5 colonial and early founding era statutes from several of the 13
6 states with respect to each of those, the polling place, the
7 courts and the legislative assemblies.

8 And we had identified on page ten of the reply brief
9 some additional state's statutes from around the time of the
10 founding with respect to those three types of sensitive places,
11 so I would I disagree with their expert, that it's a thin
12 historical record.

13 And then with respect to the other point that -- if
14 you just have a few states, that should be sufficient. I think
15 that the holding in Bruen undermines that point in general.

16 Which is, you know, there were seven or six -- six
17 states, plus the District of Columbia where the -- a law that
18 was analogous to the Sullivan law.

19 And they have been on the books for a long time and
20 that was insufficient to establish an American tradition that
21 would preserve the Constitutionality of those restrictions.

22 **THE COURT:** Anything to respond to that, Mr. Belka?

23 **MR. BELKA:** I think that one of the responses is that
24 this court has viewed some of the evidence that has been
25 provided by the defendants as outlier jurisdictions or in

1 some -- in some cases, immature governmental systems,
2 territories that were evolving into what would be states.

3 I think that four states; two territories with spot on
4 statutes that restrict guns in places of worship; four
5 municipalities; six other municipalities that completely
6 prohibited firearms; nine other states that completely
7 prohibited public carry and, therefore, did not require
8 place-of-worship-type restrictions, to me, it is a substantial
9 historical record that's been put before the Court.

10 And not anything close to the single statute and two
11 cases that the Supreme Court in Bruen deemed to be insufficient
12 or outliers.

13 **THE COURT:** All right. Well, we've talked about
14 breadth. Let's talk about duration and endurance.

15 Mr. Belka, your position echoed -- I can't remember
16 for sure, again, if it's only in your brief or if your expert
17 says the same thing; and the amicus -- all three of you say the
18 same thing, I'm not sure, but the argument is that endurance
19 doesn't matter.

20 Why?

21 **MR. BELKA:** I just don't think that endurance was part
22 of the test in Bruen. Part of the difficulty of history is
23 resurrecting it to its actual form.

24 And what this court has required, in part, is an
25 enduring American tradition, with the example of the Sullivan

1 law being in existence for 107 years and not being enough.

2 Any regulation of firearms will not pass that
3 standard. And we know that that cannot be the case, because the
4 Second Amendment cannot be a regulatory straightjacket.

5 And if the standard that is applied is an enduring
6 American tradition, as this court has understood it, meaning,
7 that had the Sullivan law -- or, I'm sorry, this court's
8 interpretation of Bruen, that the Sullivan law, 107 years, does
9 not suffice for an enduring American tradition, all gun
10 regulations will fail.

11 And that cannot be the case, because the Second
12 Amendment is not a regulatory straightjacket.

13 **THE COURT:** Well, don't you also have the ability to
14 regulate by analogy to the sensitive places?

15 That's less dependent -- maybe not dependent at all on
16 durability and endurance, right?

17 In other words, if you create a law today that is an
18 analogy to courthouses, legislative assemblies, polling places,
19 then you stop there.

20 **MR. BELKA:** I think the idea of new is kind of
21 interesting, right?

22 Since we're arguing, in fact, that a sensitive place
23 in a place of worship is not new. It's the plaintiff's argument
24 that this is a new sensitive location and so I think that it's a
25 little bit different than that.

1 **THE COURT:** I mean, I think you have got two ways to
2 get at it, as the State, don't you?

3 You can either show there is an analogy. And if there
4 is no analogy, then you can show that there is a tradition.

5 **MR. BELKA:** I think that that's this court's
6 understanding of Bruen, yes.

7 **THE COURT:** Am I wrong about that? Are there -- is
8 there not a duality -- two different ways to get at
9 Constitutionality?

10 **MR. BELKA:** I'll take two different ways, Your Honor.

11 **THE COURT:** All right.

12 Mr. Rotsko?

13 **MR. ROTSKO:** I don't think I have anything further on
14 that question right now, unless you had a specific question for
15 me on that.

16 **THE COURT:** My concern about the argument about
17 endurance doesn't matter, is that it seems to me that Bruen
18 thinks that it does.

19 Bruen was searching for: "An enduring American
20 tradition of state regulation." And in a couple different
21 times, gave little weight to enactments that were short lived.
22 So I feel like Bruen, itself, is telling me to look for
23 endurance.

24 **MR. ROTSKO:** Correct, Your Honor. There is no doubt.
25 Bruen even uses that very phrase: Enduring tradition.

1 And in your decision on the TRO, you -- you quoted a
2 number of different passages from Bruen that specifically make
3 it clear that it needs to be an enduring tradition.

4 And in another passage in the Bruen decision, the
5 Court says it needs to be well established and representative.

6 And so -- and then, of course, it has to have gone
7 back to the founding era, so I think it's unquestionable that it
8 needs to be an enduring tradition.

9 **THE COURT:** Anything else, Mr. Belka?

10 **MR. BELKA:** In this section on American tradition, in
11 Your Honor's temporary restraining order, you do cite the
12 language from Bruen, where the Court says it should not give
13 disproportionate weight to single state statute or a pair of
14 court decisions.

15 To the extent that the bar for an enduring American
16 tradition relates to the single state statute or a pair of
17 court -- a pair of state court decisions, again, I believe that
18 the State has provided significantly more evidence, as I just
19 detailed with the four states, two territories, ten
20 municipalities, nine other general prohibitions on public carry.

21 Again, I've argued that this is not a counting test.
22 I do not believe that what Bruen requires is tallying up the
23 numbers and saying that if you've got three, you have got a
24 tradition.

25 I don't believe that it's that -- I don't think that

1 it's how many scoops makes a sundae. I just think it's whether
2 or not you've got dessert.

3 **THE COURT:** Well, the Court does a lot of analysis
4 where it concludes that the statute it was looking at was an
5 outlier and it does that many times.

6 **MR. BELKA:** I think that that is -- as many people
7 have argued, the very difficult part about a historical test
8 that is not -- where the analysis is not guided by expert
9 testimony is that you can work backwards to different kinds of
10 results through historical analysis by dismissing a state
11 statute or a municipal statute as an outlier.

12 There is only one percent of the population that that
13 covered. There are lots of ways to find excuses to ignore
14 history and I just don't think that the Bruen test was to ignore
15 history.

16 I think it was to acknowledge and revere history and I
17 think that -- sometimes that that can get mixed up.

18 **THE COURT:** I don't -- I don't think that what I'm
19 doing or what Bruen is doing is looking for excuses to ignore
20 history.

21 But instead, I think, what we're trying to get at and
22 trying hard to get at is when the Second Amendment was enacted
23 in 1791, it meant something.

24 It didn't create the right. It codified the right
25 that preexisted 1791. So what everyone is trying to figure out

1 is what was the right.

2 And the way to figure it out is to see what were
3 people willing to tolerate.

4 **MR. BELKA:** And really good evidence to determine what
5 they were willing to tolerate is the kind of evidence that we've
6 provided, again, from 1868, from the reconstruction era, right?

7 Either because the stuff from 1791 doesn't exist,
8 because it hasn't made it to us throughout the course of history
9 or because we just haven't found it yet.

10 **THE COURT:** And willingness to tolerate legislative
11 enactments, to me, means that they should be on the books for a
12 length of time; maybe they should be enforced from time to time,
13 that sort of thing.

14 That, to me, is why I believe endurance matters.

15 Anything else on that topic, Mr. Rotsko?

16 **MR. ROTSKO:** Well, one point I would make is that I'm
17 fairly skeptical that the State has failed to identify any
18 founding era statutes or regulations merely because they haven't
19 had enough time to do so.

20 A lot of the material cited by the State was provided
21 to the Supreme Court in Bruen by the same expert. And they
22 had -- they had some additional time after the TRO decision and
23 all he could come up with was one new statute from Harrisburg,
24 Pennsylvania banning firearms everywhere in town, which is
25 clearly unconstitutional under Heller.

1 So I don't think -- I don't think that a lot of this
2 regulatory tradition is going to merely appear if they have more
3 time. It's just not there.

4 **MR. BELKA:** It's been 11 days since the TRO decision.
5 It is the whole span of American history that needs to be
6 searched by somebody who also has a day job.

7 Respectfully, maybe my math is wrong on the number of
8 days.

9 **THE COURT:** I think it was 14 days. We were here two
10 weeks ago, today.

11 **MR. BELKA:** I don't know why I thought it was November
12 1st. My math was correct in my head. 14 days, you are right,
13 Your Honor.

14 And, respectfully, it's a large historical record,
15 some of which is not digitized and readily searchable. And,
16 yes, historians are looking into it. And, yes, I expect it to
17 change over time, as more information is discovered.

18 **THE COURT:** Do any of you want to speak to irreparable
19 harm?

20 I don't have any new questions on that topic. Anyone?

21 **MR. ROTSKO:** I don't have any further points on that
22 topic, if Your Honor doesn't have any questions on it.

23 **THE COURT:** No.

24 **MR. BELKA:** Same. Nothing, if you don't have any
25 questions.

1 **THE COURT:** Regarding public interest, there is --
2 there is a quote that I want to ask you about -- all of you,
3 from defendant Flynn, where he was interviewed and then I'll ask
4 you whether I can even consider something like that.

5 I'm going to read the quote first, where he's being
6 asked by a reporter, WGRZ, October 20th.

7 The question from the reporter is: Now the burden is
8 on the concealed carrying -- the lawful concealed carrier to
9 know where they can and where they can't, even though there is
10 considerable changing over the last few weeks, right?

11 And Mr. Flynn's answer is: Yes. It's confusing, to
12 say the least. It's confusing because what happens, Scott, is
13 that you have -- you have legal gun owners, gun owners out
14 there, you know, who have a permit and have the Constitutional
15 right to carry a weapon and you have all these laws and all
16 these rulings out there that contradict one another.

17 And, you know, you can't do this -- you can't do this
18 and you can't do that. And, unfortunately, it's confusing for
19 the lawful citizen.

20 When in reality, it's the illegal gun owner who is
21 causing all the problem in the City of Buffalo. All of my
22 homicides, all of my shootings that occur in the City of
23 Buffalo, none of them are being done by the legal gun owner,
24 okay?

25 They are all being done by individuals who have

1 illegal weapons. And, unfortunately, like you said, it's the
2 legal gun owner who gets caught up in all the confusion.

3 So the first question I have is -- this is from an
4 interview that defendant Flynn gave on October 20th -- is it
5 something I can even consider on this record, since none of you
6 submitted it to me?

7 Mr. Kirby, do you want to start? He's your client.

8 **MR. KIRBY:** Well, Your Honor, the -- this is the first
9 I've heard of the interview or its contents, so I'm looking
10 somewhat blind here.

11 But my first impression would be that if the public
12 interest is something that the case law requires you to
13 consider, and if Mr. Flynn's apparent comments to the news media
14 have bearing on that, you very well might consider it.

15 Despite the fact that in the ordinary course of
16 things, I'll acknowledge that usually the record is confined to
17 what the parties bring before it.

18 So this presents a -- kind of a rather novel question
19 to me.

20 **THE COURT:** Mr. Belka --

21 **MR. BELKA:** So I would consider it not a particularly
22 novel question. The point of having evidence presented in
23 court, in a record before the Court is that the parties know
24 what to respond to.

25 If it's a part of the public record, I mean,

1 presumably the plaintiffs don't want to respond to every social
2 science study that identifies that guns are bad, right?

3 So I think -- understanding that this was a statement
4 made by a party in this action, I -- I don't think that it's the
5 kind of thing that the Court should take into account in making
6 its decision.

7 **THE COURT:** That's a fair argument.

8 Does anyone disagree? Mr. Rotsko?

9 **MR. ROTSKO:** I haven't researched the judicial notice
10 doctrine with respect to statements made to the press by
11 parties, but, you know, clearly Mr. Flynn knows -- he has
12 personal knowledge about what he's talking about in that
13 statement.

14 **THE COURT:** Let me ask you this then: As an
15 abstraction, leaving that evidence -- if you will, leaving that
16 aside, do any of you have anything to say about the topic
17 generally?

18 In other words, is it or isn't it a truism that the
19 people committing crimes are not lawful gun owners, carrying
20 their sidearms with the concealed carry permit in their other
21 pocket?

22 Yet, instead, it's people carrying illegal weapons who
23 are committing the crimes -- or 99 percent of the crimes or
24 whatever the number is -- does anyone have any thoughts,
25 arguments or data on that?

1 **MR. BELKA:** I have a couple of thoughts. And, one,
2 just to the totality of the record, right, I thought about, but
3 did not -- after the issuance of the TRO, the plaintiffs in this
4 case, the individual plaintiffs in this case made certain
5 statements essentially saying that they were always going to
6 follow the law.

7 And did I think about adding that to the record in
8 this case in order to bolster my argument, that these
9 individuals do not have standing and that the statute -- my
10 client, who is the State Police, would never enforce this claim
11 against these individuals, who devoutly want to follow whatever
12 the law is.

13 I did not do that, but to the extent that the Court
14 wishes to take judicial notice of plaintiff or defendant Flynn's
15 statements to the press, I might also ask that the same be done
16 with respect to plaintiffs' statements to the media surrounding
17 whether or not they will ever violate this law.

18 **THE COURT:** If you had a second point, hold it for
19 just a second --

20 **MR. BELKA:** Sure.

21 **THE COURT:** -- because I don't want to forget my
22 thoughts on this one, which is, one, I'm not going to consider
23 the Flynn statement at this point, on this motion.

24 And, secondly, I do -- just in fairness to you,
25 remember that you argued something along those lines on the

1 standing issues with respect to these individual plaintiffs the
2 last time we were here together, so that argument was something
3 that was already baked into the analysis, in my mind.

4 So was there a second part of what you wanted to say
5 in response to my last question?

6 **MR. BELKA:** Understood. And I wasn't trying to
7 resurrect any additional claims here.

8 I'm going to ask you to just repeat the question,
9 because I only held one of the two thoughts in my mind.

10 **THE COURT:** My question was regarding the --

11 **MR. BELKA:** The bad guy with the gun. So -- I don't
12 mean to cut Your Honor off.

13 **THE COURT:** That's it.

14 **MR. BELKA:** But last time it was a rhetorical question
15 that I've thought a pretty significant amount about. That
16 question and what purpose the concealed carry law serves as it
17 relates to the bad guy with the gun.

18 And while I don't think that it's a particularly good
19 frame to determine whether or not the Concealed Carry
20 Improvement Act is an unconstitutional statute, if an individual
21 is looking to be a bad actor, which is sort of what some of
22 these gun cases are about, and they want to sit in the pews with
23 their gun, I'm not sure that you can do anything -- alert
24 authorities or anything else, until the guns start firing if the
25 Concealed Carry Improvement Act is invalid and guns in places of

1 worship are allowed.

2 I think that if the Concealed Carry Improvement Act is
3 allowable, that that individual who maybe people are scoping out
4 in the pews and feel some sort of concern about, you can address
5 the situation and perhaps even have law enforcement involvement
6 to prevent somebody who has entered the church with a gun and
7 you can determine whether or not the intentions are good or bad.

8 If you are determining it another way and it becomes a
9 rights violation, because you're challenging their ability to
10 carry in a place of worship -- and, certainly, they are allowed
11 to do that if the CCIA doesn't exist, I do think that there are
12 valid ways that the CCIA can assist in the bad guy with a gun
13 circumstance.

14 Understanding, it's just incredibly hard to regulate
15 people who do not follow the law. It's just a circumstance in
16 which the CCIA could be useful to the parishioners to keep them
17 safe, et cetera.

18 **THE COURT:** If I'm the pastor and this is the church,
19 and all of you are the congregants, I don't know who is carrying
20 and who is not right now and I don't know who the bad guy is and
21 who the bad guy isn't.

22 So I don't know, what difference does it make, if
23 you've got this act or not, in terms of preventing that kind of
24 violence from the pews?

25 If he's carrying a concealed, you're not going to see

1 it. Now, if someone were to walk in with a shotgun across his
2 chest, there are half a dozen other laws he's violating when he
3 does that, right?

4 Because you can't brazenly wave a shotgun around in
5 public, I don't think. Mr. Kirby seems to agree. He's seen
6 these cases. That's the problem that I've got.

7 Mr. Rotsko, anything else on this point?

8 **MR. ROTSKO:** Well, this is one reason why I like the
9 quote that you highlighted from District Attorney Flynn, because
10 he tethers the discussion back to reality here.

11 And if you think about the Tops shooter from back in
12 May, who intended to go into a church the next day, he's going
13 to come in quickly.

14 And at least when -- without the CCIA, the church has
15 a fighting chance of trying to protect the -- or the pastor has
16 a fighting chance of trying to protect the congregants.

17 There is nothing that is going to stop that guy.

18 **THE COURT:** Go ahead, Mr. Belka, before I ask another
19 question.

20 **MR. BELKA:** Go ahead, Your Honor.

21 **THE COURT:** My question is something you said about
22 your client indicating that he wasn't going to enforce the
23 statute.

24 How -- how do people rely on something like that if
25 all three defendants come in and say this statute is here. It's

1 on the books, but I'm not going to enforce it.

2 **MR. BELKA:** I'm not saying --

3 **THE COURT:** Does that take away standing?

4 **MR. BELKA:** I apologize. I didn't say my client won't
5 enforce it. I'm saying that they are not going to enforce it
6 against the plaintiffs, because the plaintiffs have indicated
7 that they will not, under any circumstance violate the law.

8 **THE COURT:** All right. I understand your point.

9 All right. Anything else on public interest?

10 **MR. BELKA:** Nothing from the defendants, Your Honor.

11 **THE COURT:** Anyone?

12 **MR. ROTSKO:** Nothing here, Your Honor.

13 **THE COURT:** Okay. On any of the topics? Anyone? Any
14 final thoughts?

15 **MR. KIRBY:** Your Honor, on behalf of District Attorney
16 Flynn, we would just like to say that no award of cost
17 disbursements or attorney fees ought to be made as against him,
18 because the challenged statute is a creature of New York State
19 law and he did not enact it.

20 **THE COURT:** And I understand, Mr. Crosby, that your
21 client takes that position as well?

22 **MR. CROSBY:** We do, Your Honor.

23 **THE COURT:** Okay. Anything else, Mr. Rotsko?
24 Mr. Belka?

25 On the merits first, we'll do some housekeeping at the

1 end, so --

2 **MR. BELKA:** Perhaps to the merits or to logistics, but
3 defendants request that if a preliminary injunction is issued
4 that it be stayed for three days, so that an emergency appeal
5 can be taken, as has been done in other cases regarding the
6 CCIA.

7 **THE COURT:** And what's the argument for the stay for
8 three days?

9 That's it? I mean, you want -- I understand why you
10 want it, but what's your argument on the -- there is factors
11 that go into staying a preliminary injunction.

12 **MR. BELKA:** I --

13 **THE COURT:** Likelihood of success on the appeal,
14 irreparable harm, those sorts of things.

15 **MR. BELKA:** We've got all of them. No -- Your Honor,
16 I just -- it's a request for a preservation of a legislative
17 statute that certainly will be appealed, if there is a
18 preliminary injunction issued.

19 **THE COURT:** Okay.

20 Mr. Rotsko, do you want to respond to that?

21 **MR. ROTSKO:** I think that we would oppose a stay, Your
22 Honor.

23 **THE COURT:** All right. I understand the arguments. I
24 just remind everyone that as we sit here right now, the TRO
25 remains in effect until I issue an order on the motion for a

1 preliminary injunction.

2 I will do that soon, like I did the last time. And
3 I'm able to move at a good pace here, because of the
4 availability of the arguments and the fact that we did this --
5 80 percent of it, two weeks ago already, so I'll be able to move
6 relatively soon on that.

7 What's next in this case? I know that defendants will
8 need to respond to the complaint with an answer, a motion to
9 dismiss.

10 I don't know how this issue gets T'd up next, if there
11 will be discovery or not; if there will be cross motions for
12 judgment on the pleadings or cross motions for summary
13 judgement.

14 I don't know how this will play out as a litigation
15 matter, but is there a deadline that the defendants are
16 operating under at this point to respond to the complaint?

17 **MR. BELKA:** I don't know that there is a deadline, as
18 an operation of law. But if Your Honor wanted to set a deadline
19 a month out for answers and motions, that will be acceptable to
20 defendants.

21 **THE COURT:** Okay. Sounds reasonable to me.

22 Mr. Rotsko, any thoughts on December 2, which is a
23 Friday, for that deadline?

24 **MR. ROTSKO:** I -- that's fine with the plaintiffs. I
25 think that may be a little earlier, but we don't mind -- you

1 know, under the Rules of Procedure, but December 2nd is
2 acceptable to us.

3 **THE COURT:** Okay. So we'll go from there. If there
4 is a motion filed, we'll set a briefing schedule. I don't think
5 I need to do anything else housekeeping-wise.

6 Mr. Rotsko --

7 **MR. ROTSKO:** Nothing from the plaintiffs there, Your
8 Honor.

9 **THE COURT:** Mr. Belka --

10 **MR. BELKA:** Nothing from defendants, Your Honor.

11 **THE COURT:** Mr. Kirby?

12 **MR. KIRBY:** Nothing else, Your Honor.

13 **THE COURT:** And Mr. Crosby?

14 **MR. CROSBY:** Nothing, Your Honor.

15 **THE COURT:** Okay. Have a great day, everybody. Thank
16 you.

17 **MR. ROTSKO:** Thank you.

18 **MR. BELKA:** Thank you.

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20 (Proceedings concluded at 2:41 p.m.)

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2 In accordance with 28, U.S.C., 753(b), I certify that these
3 original notes are a true and correct record of proceedings in
4 the United States District Court for the Western District of
5 New York before the Honorable John L. Sinatra, Jr.

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8
9
10 s/ Bonnie S. Weber
Signature

November 8, 2022
Date

11
12 **BONNIE S. WEBER**

13 Official Court Reporter
14 United States District Court
15 Western District of New York
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